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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MELR, INC.,

Plaintiff and Appellant,

v.

SAN FERNANDO ROAD
PROPERTY, LLC, et al.,

Defendants and Respondents.

B281172

Los Angeles County
Super. Ct. No. PC056558

APPEAL from an order of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Reversed.

Law Office of Joseph M. Kar and Joseph M. Kar for Plaintiff and Appellant.

Berman Berman Berman Schneider & Lowary, Evan A. Berman and Howard Smith for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant MELR, Inc. (plaintiff) appeals from an order striking its second amended complaint as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure section 425.16 (California's anti-SLAPP statute).¹ Among other things, plaintiff contends the anti-SLAPP motion brought by defendants and respondents San Fernando Road Property, LLC (San Fernando), Harout Broutian, and Mike Telalyan (collectively, defendants) was untimely.

We agree and reverse the order. A defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action. Here, defendants filed their anti-SLAPP motion more than 15 months after the original complaint was served, and more than nine months after the first amended complaint was served. Plaintiff's claims against defendants in the second amended complaint are identical to those asserted in the earlier-filed pleadings. While a court has discretion to allow the late filing of an anti-SLAPP motion, the court's ruling in this case had the effect of undermining the statute's purpose of promptly resolving SLAPP suits.

FACTS AND PROCEDURAL BACKGROUND

David and Pamela Padula (the Padulas) owned real property on San Fernando Road in Pacoima, California. In January 2012, the Padulas entered into a 60-month commercial lease with Prestige Auto Parts & Salvage, Inc. (Prestige) for use of the property. Although the lease between the Padulas and

¹ All future statutory references are to the Code of Civil Procedure.

Prestige would expire in January 2017, it could be extended by the tenant—Prestige—through January 2022. In February 2012, Prestige assigned its rights under the lease to plaintiff. The Padulas agreed to the assignment and plaintiff made subsequent rent payments to them.

In February 2015, the Padulas sold or transferred the property to San Fernando. San Fernando, as the new owner of the property, directed plaintiff to send its rent payments to it. Telalyan is an owner and member of San Fernando. Broutian is one of San Fernando's managing members.

Even though plaintiff's lease did not expire until at least January 2017, in early May 2015, San Fernando served plaintiff with a 30-day notice to quit contending that plaintiff was a month to month tenant. San Fernando filed, and then dismissed, an unlawful detainer action against plaintiff in late May 2015. In July 2015, San Fernando filed a second unlawful detainer action against plaintiff; that lawsuit was dismissed in August 2015. In July 2015, San Fernando served plaintiff with another notice to quit contending that plaintiff's purported month to month tenancy would terminate in late August 2015. San Fernando's third unlawful detainer action proceeded to trial in November 2015, and the court entered a judgment of possession for plaintiff and against San Fernando.

In August 2015, plaintiff filed and served its original complaint.² Among other claims, plaintiff alleged that defendants interfered with plaintiff's quiet enjoyment of the property by

² Prestige was also listed as a plaintiff in the complaint. The first amended complaint clarifies, however, that Prestige "is not bringing any claims against any parties in this litigation at this time."

serving it with meritless eviction notices and unlawful detainer actions. Plaintiff also alleged defendants intentionally interfered with a sale of plaintiff's business to a potential buyer.

Defendants successfully demurred to the complaint, and plaintiff filed and served its first amended complaint (FAC) in April 2016. In light of its ruling on defendants' demurrers, the court "placed off-calendar as moot" their concurrently-filed motions to strike the punitive damages and attorneys' fees allegations in the complaint under sections 435 and 436. Other than replacing the complaint's cause of action for civil conspiracy with the FAC's cause of action for specific performance, the claims asserted in both pleadings were the same.

In May 2016, defendants demurred to the FAC and, once again, filed motions to strike the punitive damages and attorneys' fees allegations in the pleading under sections 435 and 436. In September 2016, the court sustained without leave to amend the demurrers to the cause of action for intentional interference with prospective economic advantage, and sustained with leave to amend the demurrers to the remaining claims. The motions to strike the punitive damages and attorneys' fees allegations in the FAC under sections 435 and 436 were placed off-calendar as moot. Defendants did not move to strike any of the claims in the complaint or the FAC under section 425.16, the anti-SLAPP statute, until they were repeated in the second amended complaint (SAC) filed in November 2016.

In November 2016, plaintiff filed and served the operative SAC. The SAC contains eight causes of action. All causes of action in the SAC, other than the seventh cause of action for specific performance, had been included in the original complaint.

And the seventh cause of action in the SAC had been included in the FAC.

In December 2016, defendants filed a special motion to strike all of the claims in the SAC under section 425.16. In opposition to the motion, plaintiff argued the motion should be denied as untimely because it was directed to the same allegations asserted in the prior pleadings. Relying upon *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298 (*Yu*), the court determined the anti-SLAPP motion was timely because it was filed within 60 days of the SAC and, in any event, it would exercise its discretion to hear the motion. The court granted the anti-SLAPP motion and, on January 30, 2017, entered an order dismissing the SAC. Plaintiff timely appeals from that order.

DISCUSSION

Plaintiff contends defendants' anti-SLAPP motion was not filed within 60 days of service of the earliest pleading that contains the causes of action against them, defendants did not seek permission to file a late motion, and the court's consideration of the merits of the late-filed motion was an abuse of discretion. We conclude the order granting the anti-SLAPP motion must be reversed.

1. Legal Principles and Standard of Review

The anti-SLAPP statute "provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a

probability of success. ... The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.]” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385.)

In an appeal from an order granting or denying a motion to strike under section 425.16, the standard of review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

2. Timeliness

Section 425.16 contains a timeliness standard for bringing an anti-SLAPP motion. “The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.” (§ 425.16, subd. (f).) The purpose of the time limitation is to permit “the defendant to test the foundation of the plaintiff's action before having to “devote its time, energy and resources to combating” a “meritless” lawsuit.’” (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 783 (*Platypus*).)

Here, when the issue was briefed in the trial court, there was a split in authority as to whether *any* amendment or amended pleading restarted the 60-day clock to file the anti-SLAPP motion as a matter of right, or whether the motion could only be filed if there were new substantive allegations or causes of action. (Compare *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192 [amended pleading extends or reopens the time limit only as to newly pleaded causes of action arising from protected conduct] with *Yu, supra*, 103 Cal.App.4th at p. 315 [anti-SLAPP motion was timely because it was filed within 60 days of service of the third amended complaint].) While this appeal was pending, our high court issued *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, which disapproved *Yu*. (*Newport Harbor*, at p. 646.) The court held that “subject to the trial court’s discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action.” (*Id.* at p. 640.)

In this case, defendants filed their anti-SLAPP motion more than 15 months after the original complaint was served, and more than nine months after the FAC was served. And plaintiff’s allegations against defendants in the SAC are identical to those asserted in either the complaint or the FAC. Although the allegations in the complaint were also brought by another plaintiff, Prestige, defendants’ exposure remained the same. Put differently, that Prestige was no longer a named party in the SAC was not material to the issue of defendants’ liability under the claims asserted by plaintiff in the prior pleadings. (See *San Diegans for Open Government v. Har Construction, Inc.* (2015)

240 Cal.App.4th 611, 625 (*Har Construction*).) Further, during those 15 months, the parties appeared before the court on various motions and case management conferences. On its face, this lengthy delay was contrary to the anti-SLAPP statute's fundamental purpose of requiring a court to evaluate covered claims at the outset of the action. And given the additional delay between the filing of the anti-SLAPP motion and entry of the court's order, there was obvious prejudice involved in halting plaintiff's ability to conduct discovery.

While a trial court has discretion to allow the late filing of an anti-SLAPP motion, in this case, the delay was extreme, the reason defendants offered for the delay—clarification of the parties by the removal of Prestige as a plaintiff in the operative pleading—was weak, and the court's reasons for considering the motion were unrelated to the primary purpose of the SLAPP statute. (See *Har Construction, supra*, 240 Cal.App.4th at p. 624 ["In determining whether to permit a late motion, the most important consideration is whether the filing advances the anti-SLAPP statute's purpose of examining the merits of covered lawsuits in the early stages of the proceedings."]; *Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 286 ["Discretion to permit or deny an untimely motion cannot turn on the final determination of the merits of the motion."].) Indeed, rather than advancing the anti-SLAPP statute's purpose of promptly resolving SLAPP suits, "the trial court's ruling had the effect of undermining that statute[.]" (*Platypus, supra*, 166 Cal.App.4th at p. 787.)

DISPOSITION

The order granting the anti-SLAPP motion is reversed. The matter is remanded for further proceedings. MELR, Inc. shall recover its costs on appeal.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.